Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Joseph Curcio prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 5, 1956.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is printed in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1956. Rehearing was denied on June 22, 1956, but

a stay of the mandate was granted. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

I.

Whether petitioner was denied, in a proceeding under Rule 42(a) of the Federal Rules of Criminal Procedure, the right to a hearing and to an adequate and reasonable opportunity to be heard and to introduce evidence that might demonstrate that his answers to questions put to him by the Court in the presence of the Grand Jury would incriminate him.

II.

Whether petitioner could be put in contempt for his failure to answer questions directed to be answered by the Court in the presence of the Grand Jury, so long as it denied to the petitioner a complete transcript of the Grand Jury testimony, for the purpose of demonstrating that the 15 questions chosen as the basis for the contempt proceeding were part of a series of other questions which were obviously incriminatory in nature.

III.

Whether the Court properly overruled the exercise by the petitioner of his privilege under the Fifth Amendment to the Constitution, in view of the implications of the questions asked the petitioner by the Court in the presence

of the Grand Jury and the setting in which these questions were asked."

Constitutional Provisions, Statute and Rule Involved

1. UNITED STATES CONSTITUTION, AMENDMENT V.:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. TITLE 18, UNITED STATES CODE, SECTION 401:

Power of Court.

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

3. RULE 42, FEDERAL RULES OF CRIMINAL PROCEDURE:

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Statement

On March 29, 1956, a special Grand Jury was impanelled in the Southern District of New York by District Judge Archie O. Dawson to investigate allegations of racketeer-

ing in the garment and trucking industries. (New York Times, March 7, 1956 (A.A. 52)*.) This was the aftermath of wide-spread public charges that seven local unions were recently chartered by the International Brotherhood of Teamsters to gain control of the Teamsters Joint Council and that these local unions were controlled by well-known gangsters, ex-convicts and labor racketeers, particularly one John DiGuardi, alias, "Johnny Dio". (New York Post, January 25, 1956; New York Times, March 14, 1956; New York Times, March 16, 1956; New York Times, March 23, 1956 (A.A. 51-57).)

During this period, the public press gave wide publicity also to a civil action in which these charges were repeated and which was commenced in the United States District Court for the Southern District of New York, by Martin T. Lacey, President of the Teamsters Joint Council.

United States District Judge Noonan, who directed the petitioner to answer questions in the presence of the Grand Jury, had granted a temporary restraining order in that civil action and was therefore fully familiar with the charges that were made in that civil action. (New York Times, March 23, 1956 (A.A. 55).)

The wide publicity given to these charges of racketeering in the trucking industry included press releases indicating that Mr. Christy, who was one of the Assistant United States Attorneys in the present case, had conferred with Mr. Lacey in respect to his charges (A.A. 56).

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* The symbol "A.A." refers to Appellant's Appendix which was part of the record in the Court below and which accompanies this petition.

In the examination of the prospective grand jurors for the Grand Jury investigation, the United States Attorney asked the jurors whether they were acquainted with John DiGuardi, who was identified as a labor racketeer and extortionist. (New York Times, March 30, 1956 (A.A. 56).)

It was in this setting that the petitioner, Joseph Curcio, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was served with two subpoenas for his appearance before the Grand Jury on April 10, 1956, and for the production of certain books and records of the union (A.A. 47-50). The subpoenas which directed the appearance of the petitioner stated that the petitioner's testimony was to be taken "to testify all and everything which you may know in regard to an alleged violation of Section 371, Title 18 U. S. C., on the part of the United States * * *." Local 269, of which the petitioner was Secretary-Treasurer, was one of the seven local unions alleged to have been chartered for the purpose of controlling the election of the Presidency of the Teamsters Joint Council and the newspapers carried reports that this union was allegedly controlled and run by labor racketeers and gangsters.

The petitioner appeared before the Grand Jury on April 10, 1956 and refused to answer questions on the ground, as he stated at the time, "you are throwing legal stuff here and I don't know whether you are trapping me or not" (G.A.* 6a). The petitioner was directed to return again on April 12, 1956. The petitioner admitted that he

* The symbol "G.A." refers to the Government's Appendix filed in the Court below and accompanies this petition.

was the Secretary-Treasurer of Local 269, but denied that the books and records of this union were in his possession either at the time of the service of the subpoena duces tecum (Monday, April 9, 1956) or at the time of his appearance before the Grand Jury (Thursday, April 12, 1956).

The transcript of the testimony taken before the Grand Jury on April 12, 1956, and which was not furnished to petitioner's attorney until after the petitioner was found guilty of contempt, shows that petitioner was asked a total of approximately 225 questions. Although this transcript was not furnished to the attorney for the petitioner until after the petitioner was found guilty of contempt, the entire transcript was printed as the Government's Appendix and was made part of the record in the Court below.

An examination of this transcript indicates that from some of the questions asked the petitioner, there was an implication that petitioner was being charged with a conspiracy with John DioGuardia, identified as an ex-convict and labor racketeer, in the public press to obstruct justice. These questions were (G.A. 29a):

"By Mr. Perrotta:

Q. I believe that you said you were served with the two subpoenas between the hours of 3 and 4 this past Monday, is that correct? A. When you say two subpoenas, you mean the card and the paper?

Q. Yes. A. Yes, sir.

Q. Did you get in touch with anyone after you were served with those subpoenas? A. I tried to reach my attorney.

Q. That's not the question I asked you. A. I refuse to answer on the grounds it may tend to incriminate me.

Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I request that the witness be directed to answer that question.

Foreman: The last question?

Mr. Perrotta: The series of questions that I put to him.

Foreman: The series of questions. Will the stenographer read off the series of questions, and I direct the witness to answer the series of questions one at a time and please ask them one at a time.

(Stenographer reads: 'Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?')

Witness: I maintain my privilege.

Mr. Perrotta: Would you read the next question, please?

(Stenographer reads: 'Q. You know John Dioguardia?')

Witness: I maintain my privilege.

Q. Did John Dioguardia order you not to come down or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you seen John Dioguardia since Monday

> past? A. I refuse to answer on the grounds it may incriminate me."

As appears from the transcript of the testimony, the questions were then rephrased and the petitioner was asked as to the whereabouts of the books on different days before and after he was served with a subpoena (G.A. 32a). The petitioner, believing that he was being entrapped by the form of these questions, made the following statement which appears at page 31a of the Government's Appendix:

> "The Witness: They are leading up to something, well I would like to know what to do."

Because of this fear, the petitioner refused to answer a number of questions concerning the whereabouts of the books and records of the union on the ground that the answers would tend to incriminate him (G.A. 10a).

Accordingly, on April 17, 1956, the Assistant United States Attorney in charge of the interrogation of the petitioner brought the petitioner before the district judge. The Assistant United States Attorney, out of the 225 questions, chose 15 questions as the basis for a contempt proceeding and the court reporter who had been present before the Grand Jury identified his stenotype tape of these particular 15 questions addressed to the petitioner relative to the whereabouts of the books and records and his refusal to answer any of them.

The attorney for the petitioner who was present requested a copy of the Grand Jury minutes (A.A. 4). The Assistant United States Attorney stated that the Govern-

ment was not required to turn over a transcript of the testimony (A.A. 4).

The attorney for the petitioner, although unaware of the specific nature of all the questions asked the petitioner, gave a general explanation of the basis for the petitioner's fears that the answers to the questions put to him as to the whereabouts of the books and records of the union would be dangerous. He referred to the nature of the Grand Jury investigation, as indicated by charges made in the public press and to the litigation then pending in the United States District Court and brought by Mr. Lacey. The attorney for the petitioner represented to the district judge that he believed the petitioner was asserting his rights under the Fifth Amendment in good conscience because in his mind there was some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might commence (A.A. 11).

The Court directed petitioner to answer each of the 15 questions relating to the whereabouts of the books and records of the union (A.A. 15). On the same day, April 17, 1956, the witness reappeared before the Grand Jury and persisted in his refusal to answer the 15 questions relating to the whereabouts of the books and records of the local union (G.A. 46a).

On April 19, 1956, the petitioner was brought again before District Judge Noonan. The Assistant United States Attorney stated that the Grand Jury had not voted a contempt cifation but that the purpose of bringing the petitioner before the Court was for the purpose of having

the questions put to the petitioner by the Court in the presence of the Grand Jury, at which time and if the petitioner persisted in his refusal to answer the questions a contempt would be committed in the presence of the Court (A.A. 19).

The attorney for the petitioner made a request for a reasonable time to be heard, to prepare a defense to the proceeding (A.A. 20). He requested again a copy of any testimony before the Grand Jury (A.A. 20).

The district judge stated that the requests were premature for the proceeding was not actually, as the district judge stated, a contempt proceeding as he originally thought (A.A. 21). The district judge, in the presence of the Grand Jury, directed the petitioner to answer 15 questions which were chosen out of a long series of other questions as the basis for this summary contempt (A.A. 22). These questions were:

"Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

"Q. Mr. Curcio, have you ever had possession of the books and records of this local?

"Q. Did you have custody and control of these records last Thursday?

"Q. Do you have possession of those records or any of them today?

"Q. Do you have custody and control of any of those records today?

"Q. Where are any of those records today, if you know?

"Q. Who has any of those records today, if you know?

"Q. Where were any of these records or all of these records two weeks ago today?

"Q. Where were any or all of these records a week ago yesterday, Monday?

"Q. Where were any or all of these records this past Thursday?

"Q. Where were any or all of these records a week ago Saturday?

"Q. Where are any or all of these records today?

"Q. Who, if you know, had any or all of these records a week ago Saturday?

"Q. Who had any or all of these records a week ago yesterday?

"Q. Who had any or all of these records today?".

The petitioner again refused to answer these questions on the ground, as stated by the petitioner, that the answers might tend to incriminate him (A.A. 27). The Court reminded petitioner's attorney that they had the burden of establishing that there was a justification for the claim of privilege (A.A. 29) and in support of this ruling cited the *Trock* case (*United States* v. *Trock*, — F. (2d) —), decided by the Second Circuit Court of Appeals on April 9, 1956. (This decision was summarily reversed by this Court on an application for a writ of certiorari on June 11, 1956, six days after the decision of the Circuit Court of Appeals in this case (*Trock* v. *United States*, — U. S. —), 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955).)

The attorney for the petitioner made another request for reasonable time to prepare a defense and to have it supported by witnesses and other documents which would be material and relevant (A.A. 30). Another request was made for a transcript of the testimony before the Grand Jury (A.A. 30).

There were repeated requests for a reasonable opportunity to prepare a defense and for a hearing and for a transcript of the testimony before the Grand Jury. Finally the district judge stated that "in a summary proceeding of this fashion, I don't think it is necessary * * *" (A.A. 31).

Some question arose at this point in the proceedings whether the proceeding then being held before the district judge was a secret or a public proceeding. The district court observed there was nothing secret about the proceeding and that any spectator was permitted to come into the courtroom. The district court made the following further observation (A.A. 32):

> "The Court: The press is here, I see; at least I assume they are members of the press. I think I recognize one. So there is no secrecy about this proceeding."

Again the attorney for the petitioner requested an opportunity to prepare a defense and call witnesses (A.A. 32).

The attorney for the petitioner insisted that the furnishing of a detailed explanation would amount to the petitioner testifying against himself (A.A. 34). The district judge replied (A.A. 34):

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement

> block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him over the head."

Petitioner's attorney pleaded for the opportunity of furnishing an explanation for the petitioner's refusal in the absence of the Grand Jury and in the absence of the Assistant United States Attorneys (A.A. 35). He stated later that he would furnish the explanation privately to the Court in the presence of the Assistant United States Attorney present, but in the absence of the Grand Jury (A.A. 35). The repeated requests for a hearing of any kind were denied and up to this point no transcript of the Grand Jury testimony was furnished to the petitioner or his attorney. The district court summarily adjudicated the witness in contempt of court and committed him to the custody of the marshal (A.A. 35).

The petitioner was sentenced to a six-months term with the privilege of purging himself of the contempt at any time by answering the questions (A.A. 35).

It was after the petitioner was found guilty of contempt of court that he was furnished for the first time with a complete transcript of the Grand Jury testimony.

An appeal was taken from the order of the district court to the United States Court of Appeals for the Second Circuit (A.A. 46). An application for bail was granted on May 7, 1956 (Clark, Chief Judge, Frank, Circuit Judge, concurring, and Hincks, Circuit Judge, dissenting).

The appeal was argued on May 14 and 15, 1956 before Medina, Lumbard and Waterman, Circuit Judges. On June 5, 1956, the Court below affirmed the judgment of the district court on the ground that the petitioner did not make a showing that he was likely to be endangered by answering the questions and that a hearing was not required nor necessary, nor could a hearing serve any useful purpose.

A petition for rehearing was denied by a decision rendered on June 22, 1956 and a stay of the mandate was granted.

Reasons for Granting the Writ

The decision of the Court below is directly in conflict with the applicable decisions of this Court in *Hoffman* v. *United States*, 341 U. S. 479, and *Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955) decided by this Court on June 11, 1956, and which reversed a decision of the Second Circuit Court of Appeals. The decision of the Court below is also in conflict with the decision of the First Circuit Court of Appeals in *Carlson* v. *United States*, 209 F. (2d) 209, and the many decisions in other circuits. This confusion and conflict is thoroughly analyzed in an excellent article, Wolfram, "Peril, Pursuit and the Privilege Against Self-Incrimination: The Problem of the Apparently Innocuous Question", 5 Syracuse Law Review 127 (Spring 1954).

1. The first question relates to the procedure under Rule 42 of the Federal Rules of Criminal Procedure. The attorney for the petitioner made four separate requests for a hearing to produce witnesses and documents to

establish the petitioner's justification for the assertion of his privilege against self-incrimination (A.A. 20, 30, 31, 35). These requests included a request to furnish an explanation for the petitioner's silence in private in the absence of the press, spectators and the Grand Jury, but either with or without the presence of the Assistant United States Attorney (A.A. 35). The requests were not granted. Instead the district court speculated that the petitioner's refusal to furnish a detailed explanation was the fear of bodily harm (A.A. 34).

Circuit Judge Medina, writing the opinion for the Court below, justifies these refusals on the ground that the petitioner did not state as to who the witnesses were he intended to produce, or what would be the subject of their testimony. Actually, however, the district judge did not request a list of the witnesses, nor a statement of the nature of their testimony, but denied the requests on the ground that a hearing was not necessary (A.A. 31). The Court below agreed with the district court that in a proceeding under Rule 42(a) of the Rules of Criminal Procedure, no hearings are necessary or required and drew a distinction between the procedure under Rule 42(a) and the situation where a Grand Jury cites a witness for contempt for his refusal to answer questions before the Grand Jury, or where the proceeding is initiated by order to show cause (Opinion, Appdx. A, p. 32).

The offense allegedly committed by the petitioner consisted of an alleged disobedience to the direction of the Court to answer questions as directed by the Court. However, an essential element of the offense, therefore, is a determination of the validity of the Court's direction in

the light of the petitioner's rights under the Fifth Amendment. Therefore, the petitioner's duty to comply with the directions of the district court depended not upon the mere existence of the Court's order or direction, but upon the validity of the petitioner's claim of privilege.

This issue involves a determination of a number of issues of fact not within the personal knowledge of the judge and, therefore, petitioner as a matter of simple justice was entitled to a reasonable opportunity to produce witnesses and documents relevant to the factual issues to be determined. This type of contempt is far different from contempts committed in the presence of the Court and involving violence or other disturbances.

In *Cooke* v. *United States*, 267 U. S. 517, this Court held that if the elements of the offense of contempt depend upon determinations of issues of fact not within the personal knowledge of the judge, due process requires that the accused be given an opportunity to produce witnesses, documents and to offer explanations and arguments.

In the post *Hoffman* (341 U. S. 479) era, in determining the application of the privilege a court must examine the circumstances under which the questions were propounded and the full implication of the questions and the court must be governed not only by personal perception of the peculiarities of the case, but also by the facts. *Kiewel* v. *United States*, 204 F. (2d) 1 (C. C. A., 8, 1953).

Certainly "short cuts" should not affect the fundamental rights of a witness and whether the Assistant United States Attorney adopts the procedure under subdivision (a) of Rule 42 or the procedure under subdivision

(b), in either case the witness is entitled to an adequate opportunity to demonstrate his right to the assertion of the privilege against self-incrimination.

If the witness had been cited for contempt by the Grand Jury, or the witness had been prosecuted for contempt, as Chief Justice Warren stated in *Quinn* v. *United States*, 349 U. S. 155, 162, the respect normally accorded the privilege would be then buttressed by the presumption of innocence accorded to a defendant in a criminal trial.

Is this presumption to be eliminated because the Assistant United States Attorney chose to proceed under Rule 42(a) and have the questions simply repeated before the Court in the presence of the Grand Jury?

If, as the Court below held, a hearing under Rule 42(a) is not necessary, then how could the petitioner make a showing, which Circuit Judge Medina stated is lacking in this case, that the petitioner had any dealings with racketeers or extortionists or that Local 269, of which he was Secretary-Treasurer, was in some way involved in the controversy between Lacey and O'Rourke? In passing, it should be noted that this portion of the opinion of the Court below completely ignored the charges in the newspapers which was made part of the record in the Circuit Court of Appeals, to the effect that Local 269, of which petitioner was Secretary-Treasurer, was under the control of an alleged labor racketeer, John DioGuardia (A.A. 57, 58, 59, 60).

The Court below stated that the procedure adopted in the instant case followed the pattern long in vogue in the Second Circuit, and citing *United States* v. *Trock*, Second Circuit, — Fed. (2d) —, decided April 9, 1956.

While petitioner's appeal in the Court below was being argued, an application for a writ of certiorari was pending in this Court in *Trock* v. *United States*. On June 11, 1956, six days after the decision by the Court below in the instant case, this Court on the application for a writ of certiorari summarily reversed the Court below and reversed the judgment adjudging Trock guilty of contempt of court (*Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955)). The following is the *per curiam* opinion:

> "Per curiam: Petition for writ of cert. granted and judgment reversed. Hoffman v. United States, 341 U. S. 479."

This Court's summary reversal of the decision of the Second Circuit Court of Appeals in the *Trock* case, is an indication that any effort to water down or take away the protection of the Fifth Amendment by resort to hair-splitting will not be tolerated.

The decision of the Court below is directly in conflict with the decision of the First Circuit Court of Appeals in *Carlson* v. *United States*, 209 F. (2d) 209. The Court in that case wrote as follows at page 215:

> "But although Rule 42 is not applicable, the constitutional requirement of due process of law makes it necessary for the judge to give the witness an adequate opportunity to be heard, and to introduce evidence, if the witness so desires, bearing on the issue whether, disregarding merely fanciful and far-fetched hypotheses, it is clearly evident from the implication of the question, in the setting in which it is asked, that a responsive answer might be dan-

gerous because injurious disclosure could result. See *Hoffman* v. *United States*, 1951, 341 U.S. 479, 71 S. C. 814, 95 L. Ed. 1118."

2. The second question relates to the refusal to furnish to the petitioner or his attorney a complete transcript of the Grand Jury testimony. The petitioner made four requests for a complete transcript of the Grand Jury testimony (A.A. 4, 20, 26, 30). These requests were denied. The complete transcript of the Grand Jury testimony was furnished after the petitioner was found guilty of contempt and this complete transcript has been printed as part of the Government's Appendix. It appeared, therefore, upon the argument of the appeal in the Court below, that the 15 questions were part of more than 200 questions and that the questions relating to the whereabouts of the books of the union, which petitioner refused to answer, were connected with other questions which carried the implication that petitioner was ordered by John DiGuardi, who had been identified as a labor racketeer, not to produce the books (A.G. 29a). As a basis for the contempt proceeding, the Assistant United States Attorney chose 15 questions out of a series of more than 200 questions.

The Court below wrote in its opinion that petitioner's demands for the transcript of the Grand Jury testimony were vague and belated. A reading of the testimony will indicate that they were certainly not vague and they were consistently made from the beginning of the proceedings.

Circuit Judge Medina wrote in his opinion that the petitioner was in constant consultation with his attorney during his appearance before the Grand Jury on April 12, 1956 (Opinion, Appdx. A, p. 33). The Court below implied

that the petitioner remembered 225 questions and that, therefore, as Judge Medina wrote, petitioner's counsel could have directed the attention of the Court to that part of the interrogation which might be claimed to support the alleged privilege. Placing this intolerable burden on a witness certainly perverts the constitutional protection against self-incrimination. Moreover, this sort of an approach cannot be reconciled with a decision of the same Court below in *United States* v. *Zwillman*, 108 F. (2d) 802, where the learned Augustus N. Hand wrote as follows at page 803:

> "It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense."

3. The third question relates to whether it is evident from the implication of the questions asked the petitioner by the district judge in the presence of the Grand Jury, and the setting in which these questions were asked, that responsive answers to the questions or an explanation of

why they cannot be answered might be dangerous to the petitioner because injurious disclosure would result.

The Court below held that labor union officials are required to produce records of the union in their possession and that this requirement would be meaningless if the lawful custodian of the records could not offer possession to another and then refuse to say when or where he had last seen them, on the ground that any testimony on the subject would tend to incriminate him. The Court below held that to sustain the privilege under these circumstances would provide an easy method by which any investigation could be hamstrung from the start (Opinion, Appdx. A, p. 35).

In a recent decision by the same Court below other judges of the Second Circuit Court of Appeals had approved a finding of the district court permitting a custodian of record to refuse to answer questions as to the whereabouts of the books and records on the ground that "legal basis for resort to the privilege was found in the fact that testimony as to the destruction of the records might lead to prosecution for violation of I. R. C. Sec. 145(b) and evasion of the tax * * *." (*United States* v. *Patterson*, 219 F. (2d) 659.)

In the instant case, the setting was such that on petitioner's appearance before the Grand Jury petitioner could reasonably have feared that he was not only to be thoroughly investigated but that he was to be prosecuted. The appendix to petitioner's brief in the Court below included newspaper clippings, articles and magazines widely distributed containing news releases issued by the Government to the effect that a thorough investigation was to be

made by the Grand Jury of the seven recently chartered local unions of the International Brotherhood of Teamsters in connection with public charges that they were controlled by well-known gangsters, ex-convicts and labor racketeers (A.A. 51-66). The United States Attorney had examined prospective jurors of the Grand Jury of their knowledge of and acquaintance with John DiGuardi, described as a labor racketeer and extortionist, and allegedly President of Local 269, of which the petitioner was Secretary-Treasurer.

The Third Circuit Court of Appeals held in *United States* v. *Coffey*, 198 F. (2d) 440, that this alleged association would be enough to furnish sufficient weight and credibility to the suggested connecting chain of incriminating evidence.

The petitioner in the instant case was specifically asked whether he knew John DiGuardi, whether John DiGuardi had ordered him not to produce the books and records (G.A. 29a). These questions of course were not chosen as the basis for the contempt proceeding, but instead the Assistant United States Attorney chose other questions which sought to obtain the information in another way.

Can an Assistant United States Attorney justify a contempt proceeding by the expert use of scissors and choose questions which look harmless on their face when separated from other questions which are obviously incriminatory in nature?

The decision of the Court below is in conflict with the decisions in *Foot* v. *Buchanan*, 113 Fed. 156 (Circuit Court,

N. D., Mississippi, 1902) and *People* v. *Newmark,* 312 Ill. 625.

Petitioner honestly believed he was being trapped by these questions as rephrased for as appears from the transcript of the Grand Jury testimony, at page 31a he made this statement:

> "'The Witness: They are leading up to something, well, I would like to know what to do.''

In view of this setting, the petitioner could reasonably have sensed the peril of prosecution for a wide variety of federal offenses, including the Anti-Racketeering Act, the act prohibiting conspiracies to violate the laws of the United States, and conspiracies to obstruct justice. If in fact the petitioner conspired with John DiGuardi to hide or conceal the records, then the answers to the whereabouts of these books might conceivably lead to a charge to obstruct justice. *Bosselman* v. *United States,* 2 C. C. A., 239 Fed. 82; *Heinze* v. *United States,* 2 C. C. A., 181 Fed. 322.

The petitioner had reasonable grounds to suspect that he was being summoned before the Grand Jury in the hope that some incriminating disclosures could be extracted from him. *Maffie* v. *United States,* 1 C. C. A., 209 F. 2d 225.

In the quest for a satisfactory formula for the application of the privilege against self-incrimination, the Second Circuit in its decisions has placed upon the witness the burden of demonstrating that he was being hotly pursued for a federal offense. The Court below has not given this Court's decision in *Hoffman* v. *United States, supra,* 341

U. S. 479, the broad interpretation which this Court intended.

In *United States* v. *Trock*, — F. (2d) —, decided by the Court below on April 9, 1956, Chief Judge Clark referred to the conflicting principles of the applicable decisions and while expressing his sympathy for the law as it was developing begged for a holding by this Court that any honest claim of self-incrimination deliberately and positively made by a witness before a Grand Jury—a potential accused—must be respected.

This Court gave a decisive answer to this plea and summarily reversed the decision of the Court below on an application for a writ of certiorari in *Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, October Term, 1955, decided June 11, 1956). This Court reversed the decision of the Court below although as appeared in the majority opinion of the Court below that the appellant or petitioner was not a notorious criminal or racketeer, nor was apparently anyone else whose names were mentioned in the hearings before the district court, a feature which makes the instant case even stronger on the facts than the *Trock* case. This very quick and summary reversal indicates that this Court intends to give to its decision in *Hoffman* v. *United States*, a broad and liberal construction consistent with the view of this Court that the privilege must not be narrowly or begrudgingly applied. *Quinn* v. *United States*, 349 U. S. 155, 162.

Clearly, the questions presented are of particular importance in the administration of federal criminal law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

July 16, 1956.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———o———

No. 385—October Term, 1955.

(Argued May 14 and 15, 1956 Decided June 5, 1956.)

Docket No. 24105

———o———

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH CURCIO,

Defendant-Appellant.

———o———

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

———o———

Appeal from an order of the United States District Court for the Southern District of New York. Gregory F. Noonan, *Judge.*

Defendant appeals from an order adjudging him in contempt for refusal to answer certain questions propounded to him by the District Judge before a Grand Jury. Affirmed.

———o———

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Arthur H. Christy, Herbert M. Wach-

tell, Fioravante G. Perrotta and Charles H. Miller, Assistant United States Attorneys, New York City, of Counsel), *for appellee.*

Arnold Cohen, New York City (Samuel Mezansky and Arnold Cohen, New York City, of Counsel), *for appellant.*

—o—

Medina, *Circuit Judge*:

On March 29, 1956, a Special Grand Jury was impanelled in the Southern District of New York to investigate charges of racketeering in the garment and trucking industries. Appellant, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, having been duly served with a personal subpoena, and a subpoena *duces tecum* calling for the production of certain books and records of the union, failed to produce the books and records and refused to answer questions as to their whereabouts, claiming an alleged privilege under the Fifth Amendment and asserting that answers to the questions might tend to incriminate him. For such refusal he was adjudged guilty of a criminal contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and sentenced to imprisonment for six months, unless he sooner purged himself by answering the questions. From the order containing such adjudication and commitment defendant appeals.

On his first appearance before the Grand Jury on Tuesday, April 10, 1956, in response to the subpoenas, appellant refused to answer any questions whatever, stating that he had not consulted a lawyer and that he would not testify

until he had done so. The matter was put over to Thursday, April 12, 1956, when appellant arrived with his counsel, who remained in the anteroom of the Grand Jury during the time of appellant's interrogation. The full record of what occurred has been released and is on file but is not part of the record before us. It does appear, however, that appellant was determined to give no information whatever concerning the whereabouts of the books and records, although he readily admitted that there were such books and records and that he was Secretary-Treasurer of Local 269. He did testify that these books and records were not in his possession either at the time of the service of the subpoena *duces tecum* (Monday, April 9), or at the time of his appearance before the Grand Jury (Thursday, April 12).

Accordingly, on April 17, the Assistant United States Attorney in charge of the interrogation of Curcio brought the matter of his recalcitrance before the District Judge for a determination of whether or not the Fifth Amendment plea should be sustained or overruled. The court reporter who had been present before the Grand Jury identified his stenotype tape of some fifteen questions addressed to appellant relative to the whereabouts of the books and records and his refusals to answer any of them. Appellant's counsel was present. His first move was to request that "the witness be furnished with a copy once the minutes are transcribed of the questions which are the subject in issue at the present time." The reporter then testified at length to the record of what occurred before the Grand Jury, giving the text of the fifteen questions and whatever was said in reference thereto by appellant, by the foreman

of the Grand Jury and by the Assistant United States Attorney conducting the examination of appellant.

The questions were:

Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

Q. Did you have custody and control of these records last Thursday?

Q. Do you have possession of those records or any of them today?

Q. Do you have custody and control of any of those records today?

Q. Where are any of those records today, if you know?

Q. Who has any of those records today, if you know?

Q. Where were any of these records or all of these records a week ago Thursday?

Q. Where were any or all of these records a week ago Saturday?

Q. Where were any or all of these records a week ago yesterday, Monday?

Q. Where were any or all of these records this past Thursday?

Q. Where are any or all of these records today?

Q. Who, if you know, had any or all of these records a week ago Saturday?

Q. Who had any or all of these records a week ago yesterday?

Q. Who had any or all of these records today?

There was extended argument, principally by appellant's counsel, on the subject of whether or not there was any plausible basis for appellant's claim that answers to the questions might tend to incriminate him. The principal contention was:

> I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

Reference was also made in a vague way to a civil litigation "going on on the 15th floor," which was a trial of a controversy between Martin T. Lacey and John J. O'Rourke over an election to the presidency of the Teamsters Joint Council. Lacey had charged that O'Rourke and his adherents, or some of them, were mixed up with gangsters and racketeers. Some photostats of newspaper clippings relating to the Lacey-O'Rourke controversy and also to a so-called drive against "city rackets" by the federal and local prosecutors, are contained in appellant's Appendix. But, so far as we can make out, there is nothing in the record before us to indicate that appellant is connected with or suspected of being connected with any crime.

At the close of an extended argument the court directed appellant to answer each of the fifteen questions and the Assistant United States Attorney stated "for the record" that there were other questions, not relating to the books and records, which appellant had refused to answer and, with the approval of the court, these were reserved for

"some future date," should the government desire rulings thereon. No objection to this procedure was made by appellant's counsel who merely requested an opportunity to consult with his client before appellant returned to the Grand Jury room; and this request was granted.

On April 19, 1956, appellant returned to the Grand Jury and persisted in his refusal to answer any of the questions pertaining to the whereabouts of the books and records. Appellant was brought before the court and, after some further argument to which reference will be made shortly, the Court in the presence of the Grand Jury directed appellant again to answer the questions. Upon his refusal to do so he was adjudged in contempt.

Appellant claims that he was not afforded a hearing as required by law, that he was not furnished with a full copy of the minutes of the Grand Jury proceedings during his interrogation on April 10 and April 12, and that he was justified in refusing to answer the questions.

We find no defect in the procedure followed here, which follows the pattern long in vogue in this Circuit. See *United States* v. *Trock*, 2 Cir., —— F. 2d ——, decided April 9, 1956. Appellant did have a full and fair hearing on April 17. The subject matter of this hearing was the exercise of his alleged constitutional right under the Fifth Amendment. Both appellant and his counsel were afforded every opportunity to produce any evidence, by appellant or by others, which might tend to show that there was a plausible basis for the claim of privilege. But nothing was said about any witnesses nor can we find any basis whatever for appellant's alleged fear that he may be "trapped," as he expressed it.

The requests for "a list of specifications," for a transcript of the testimony of appellant before the Grand Jury on April 12, and for "a reasonable time to prepare the defense" and "have it supported by witnesses or any other documents that I may feel are relevant or material to the defense of contempt in a contempt proceeding," were all made on April 19, after appellant had again refused to answer the questions. These demands were evidently based upon a misconception of the function of the proceedings which had already taken place on April 17, or they constituted a last ditch effort to delay the proceedings. There is no indication as to who the witnesses were or what would be the subject of their testimony. Perhaps counsel did not anticipate that the court would without further ado, and in the presence of the Grand Jury, himself put the questions to the witness and direct him to answer. But that is what took place; and the refusals to answer thus clearly constituted a criminal contempt "in the actual presence of the court," to be punished summarily, as provided in Rule 42(a) of the Federal Rules of Criminal Procedure. No hearing on this phase of the matter was required or necessary; nor could a hearing have served any useful purpose.

Nothing to the contrary was held by the First Circuit in *Carlson* v. *United States*, 209 F. 2d 209 or in *Hooley* v. *United States*, 209 F. 2d 219. Had the Grand Jury merely cited or presented appellant to the court, for his refusals before the Grand Jury to answer questions in accordance with the prior directions of the court, an entirely different situation would have been presented. Had that been the

case here the contempt would not have been committed "in the actual presence of the court."

Nor do appellant's contentions find support in *United States* v. *Zwillman*, 2 Cir., 108 F. 2d 802. That was also a case where the alleged contempt had been committed in the presence of the Grand Jury, not in the presence of the court. At the hearing which covered the entire matter, including such argument or evidence as had relevancy to defendant's claim of privilege under the Fifth Amendment, counsel asserted that a scrutiny of the Grand Jury minutes of defendant's interrogation would reveal the fact that he had been engaged in the liquor business before the repeal of the Eighteenth Amendment, and he also proffered witnesses on the subject. As the questions which Zwillman refused to answer sought to elicit the names of his business associates in the years 1928 to 1932, it was held that there had been a curtailment of his right to "show that he was likely to be endangered by answering," and the contempt adjudication was reversed. Here the very contrary appears. There was a hearing at which appellant was given the fullest opportunity to "show that he was likely to be endangered by answering," and he failed to do so. At the hearing on April 17 there was no intimation that anything said by appellant in his so-called testimony before the Grand Jury on April 12 had any bearing on his refusals to answer the questions concerning the whereabouts of the books and records, nor was any such suggestion made at any time. Appellant was in constant consultation with his counsel during the entire period of his appearance before the Grand Jury on April 12, and it is reasonable to suppose that counsel would have directed

the attention of the court to any part of such interrogation which might be claimed to support the alleged privilege, as was done in the *Zwillman* case. Mere vague and belated demands such as we have in this record are plainly insufficient.

It should be unnecessary to add that counsel's suggestion, just before the court propounded the questions to appellant for the last time, that he inform the court confidentially, and in the absence of the Grand Jury, of "exactly what is in my mind, and most likely in my client's mind," added nothing of significance to the record.

On the merits we think the case too clear for reasonable debate. In *United States* v. *White*, 322 U. S. 694, the Supreme Court refused to recognize a claim of privilege asserted by a labor union official with respect to certain records of the union in his possession because, as the Court stated at page 699:

> (T)he official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.

This requirement to produce would be no more than an empty and meaningless form of words if the lawful custodian of the records could hand over possession to another and then refuse to say when or where he had last seen them on the ground that any testimony on the subject would tend to incriminate him. To sustain the privilege

here asserted would provide an easy method by which any investigation could be hamstrung from the start.

Although there is nothing before us to show that appellant has had any dealings with racketeers or extortionists, we may assume that Local 269 is in some way involved in the controversy between Lacey and O'Rourke and that he has or has had some contact with O'Rourke, who, we are told, has been charged with seeking the presidency of the Teamsters Joint Council through the acts of gangsters and racketeers. We are nevertheless at a loss to see how appellant's answers to any of the fifteen questions here propounded can have any tendency to incriminate him.

It is said that he has a criminal record. But what of that? We are not informed of the nature of the charge upon which he was convicted nor of the date thereof; nor have we any reason to suppose that there is any connection between the whereabouts of the books and records of Local 269 and the crime or crimes which appellant is said to have committed.

It seems to be supposed by counsel that notorious criminals, racekteers and unsavory characters generally have an open sesame to the privilege guaranteed by the Fifth Amendment. But we can draw no such inference from the rulings made in *Hoffman* v. *United States*, 341 U. S. 479 and *United States* v. *Doto*, 2 Cir., 205 F. 2d 416, strongly relied upon by appellant. It is not the general reputation or criminal record of the witness which controls but rather the circumstances of each particular case. The constitutional rights of the so-called "little fellow" are entitled to

no less protection than are the rights of those who pursue a career of crime in the grand manner. The test is whether or not on the record before the court defendant has made a showing "that he was likely to be endangered by answering the questions." *United States* v. *Zwillman, supra.* We can find no such showing here.

United States v. *Trock,* —— F. 2d ——, decided by this Court on April 9, 1956, is especially urged upon us as in some way supporting appellant's contentions. But there is no similarity whatever between the two cases. In that case there was an insufficient showing of peril to the witness; here there is no showing whatever. Mere atmosphere will not suffice.

Affirmed.